Supreme Court, U.S.
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No. 96-779

In The

Supreme Court Of The United States

October Term, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,

Petitioner,

v.

RALPH FORBES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. When the government sponsors a debate for political candidates, does it create a limited public forum?

2. May the government discriminate against balloted candidates, banning them from its debate, on the basis of party affiliation or the popularity of the candidates' views?

3. May the government directly influence the outcome of an election by subjectively looking at individual candidates, determining their worthiness, and then conferring special benefits on the candidates of its choice?

LIST OF PARTIES

In the Court of Appeals, the ffollowing were parties:

Appellant: Ralph P. Forbes

Appellees:

Arkansas Educational Televisiion Commission
Arkansas Educational Televisiion Network Foundation*
Dr. Caroline Whitson
Victor Fleming
Diane Blair
James Ross
Jerry McIntosh
Lillian Springer
Lavenia Craig
Robert Doubleday
Susan J. Howarth
Amy L. Oliver Barnes

* The Arkansas Educationall Television Network Foundation has no parent or nonwhollly owned subsidiaries.

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NATURE OF THE CASE

Government Petitioner Arkansas Educational Television Network ("AETN") is an agency of the State of Arkansas that owns and operates a network of five public television stations. In sponsoring a debate for the Arkansas Third Congressional District, AETN invited only the Republican and Democrat candidates and excluded Respondent Ralph Forbes, the only other state-qualified and balloted candidate. Forbes' requests to participate in the debate were denied, and the government aired its debate without him.

The instant case raises questions fundamental to a free and democratic society. May the government directly influence an election by subjectively looking at individual candidates, determining their worthiness, and then conferring special governmental benefits on the particular candidate(s) it has chosen? May the government discriminate by excluding from a public debate balloted candidate speakers on the basis of their party affiliation or the popularity of their views?

The Eighth Circuit's opinion below was a narrow holding. AETN did not have to hold a public debate, but once it did, it created a limited public forum and had to include Forbes, the only other legally balloted candidate. While AETN retained full editorial discretion over its other programming and the format and details of the debate, under the First Amendment it could not exclude balloted candidates. AETN and *amici* now ask this Court for a broad holding contrary to First Amendment jurisprudence: that government-owned and -operated stations are free from the First Amendment constraint.

PROCEEDINGS BELOW

Petitioner AETN decided to sponsor a debate for the 1992 Third Congressional District race in Arkansas and to exclude balloted candidate Ralph Forbes. On October 19, 1992, three days before the debate, Forbes brought suit against

Arkansas Educational Television Commission ("AETC") and AETN and their agents in the United States District Court for the Western District of Arkansas for violations of his rights under the First Amendment as well as of the voters' rights. (J.A. 14)[1]

The District Court denied Forbes' request on October 20, 1992. On October 21, 1992, Chief Judge Arnold of the Eighth Circuit, sitting as a single circuit judge, denied Forbes' request for injunctive relief pending appeal. On October 22, 1992, an Eighth Circuit panel declined to overrule that decision. The debate was held with all the qualified and balloted candidates except Forbes on October 22, 1992.

On December 16, 1992, the District Court granted Defendant AETN's motion to dismiss Forbes' constitutional claims. Forbes appealed. On April 28, 1994, the *en banc* Eighth Circuit, Chief Judge Arnold writing, reversed the dismissal of Forbes' claims. *Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d 1423 (8th Cir.) (*en banc*), *cert. denied*, 513 U.S. 995 (1994) ("*Forbes I*"). The court held under the facts

> that Forbes did have a qualified right of access created by AETN's sponsorship of a debate, and that AETN must have a legitimate reason to exclude him strong enough to survive First Amendment scrutiny.

Id. at 1428. Otherwise, the court noted, state-owned stations would be allowed "to exclude all Republicans, or all Methodists, or all candidates with a certain point of view." *Id.*

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[1] "App." refers to the appendix to the Petition for Certiorari; "D. Ex." refers to defendant's trial exhibits; "J.A." refers to the Joint Appendix; "Pet. Brief" refers to the Petitioner's Brief; "Tr." refers to the transcript of the trial held June 5-7, 1995; "Pl. Exh." refers to plaintiff's trial exhibits.

Trial was held on Forbes' constitutional claims on June 5-7, 1995. The court considered the debate a non-public forum. The district court instructed the jury to answer only whether AETN's decision to exclude Forbes was the result of political pressure from government officials or because of AETN's opposition to his views. (App. 22a-23a) The jury answered the two questions, "No." The district court entered judgment in favor of AETN. (App. 21a)

Forbes appealed, and on August 21, 1996, a unanimous panel of the Eighth Circuit Court of Appeals reversed. *Forbes v. Arkansas Educ. Television Comm'r*, 93 F.3d 497 (8th Cir. 1996) ("Forbes II"). Chief Judge Arnold and the panel held that the debate was clearly a limited public forum. *Id.* at 504. Forbes was within both the class of speakers (candidates for the Third District) and the subject matter of the debate (who should be elected). *Id.*; *see also Forbes I*, 22 F.3d at 1429. The court said the "government cannot, simply by its own *ipse dixit*, define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation." *Forbes II*, 93 F.3d at 504. The court held that AETN's reason for excluding Forbes was its perception that he was not "viable," a reason it found legally insufficient. *Id.* The court noted that AETN journalists were "employees of government" and that the "viability" of Forbes was a

> judgment to be made by the people of the Third Congressional District, not by officials of the government in charge of channels of communications.

Id. at 504-05. AETN's exclusion of the third and only other qualified and balloted candidate was thus held unconstitutional. *Id.* at 505.

This Court granted Petitidon for Writ of Certiorari on March 17, 1997.

STATEMENT OFF THE FACTS

On October 22, 1992, AAETN staged a congressional debate for Arkansas' Third Congreessional District of the United States House of Representatives. In a three-person race for the Congressional Seat, Respondent Ralph Forbes was the only qualified and balloted candidate exxcluded from the government-sponsored debate. The governnment automatically included Democrats and Republicans onn the basis of their party affiliation. (Tr. 260-61, 266, 270-771 (S. Howarth), J.A. 133-35, 137-38; Tr. 293 (A. Oliver), J.A. 1140; Pl. Exh. 21, J.A. 175-76, Tr. 260, 264) AETN excluded Fcorbes because, in its opinion, he was not a viable candidate and tthus the viewers would not be interested in hearing from him. (FPet. Brief at 16; Tr. 198-200, 212, 258, 269-70 (S. Howarth), J.AA. 117-19, 126, 133, 136-38; Tr. 299, 304, 341 (A. Oliver), JJ.A. 144, 147, 153) In the election cycle in 1990, however, jjust two years earlier, Forbes had received 46 percent of the vote in a *statewide* three-candidate race for the Lieutenant GGovernor Republican Primary. (Tr. 318-21, 343 (A. Oliver) J.A. . 149-51, 153-54; Pl. Exh. 3, J.A. 169, 171, Tr. 113, 115) In thatt race, Forbes won a majority vote in 15 of the 16 countities comprising the Third Congressional District seat for whiich he was running in 1992. (Tr. 318-21 (A. Oliver), J.A. 149-551; Pl. Exh. 3, J.A. 169, 171, Tr. 113, 115) AETN's descriptionn of Forbes in its Questions Presented and Brief as a candidaate in whom the public has shown "*no interest*" is not accuratee. (Pet. Brief at i, 15)

1. Petitioner AAETC and AETN

Petitioner is the governmentt. AETC is an agency of the State of Arkansas. ARK. CODE AANN. § 6-3-101 (App. 47a) AETC and its commissioners operrate AETN. (Tr. 183-84 (S. Howarth), J.A. 107-08) The eight ccommissioners are appointed

by the Governor of Arkansas. § 6-3-102(b)(1), (App. 48a) Appointments by the Governor require the advice and consent of the Arkansas Senate. § 6-3-102(b)(1)-(4) (App. 48a) The commissioners in turn appoint the Executive Director of AETC and AETN, who currently is Susan Howarth. (Tr. 183-84 (S. Howarth), J.A. 108) Public appropriations fund the state agency and network. § 6-3-113 (App. 54a-55a) All employees are supervised only by other State employees paid from State funds. § 6-3-110(d) (App. 53a) AETN's organizational chart, admitted at trial, clearly sets forth its purely governmental character. (D. Ex. 3, J.A. 179, Tr. 180, 183) AETN is a state-created, -owned and -operated media chain that blankets the State of Arkansas and its voters.

2. The Debate

In 1992, AETN decided to sponsor and hold Congressional Candidate Debates, including one for the Third Congressional District of Arkansas. Each debate was to last one hour. (Tr. 200 (S. Howarth), J.A. 119) When the instant debate was set up, AETN invited all the candidates balloted at that time. (Pet. Brief at 14) Two months later, Forbes qualified and entered the race. *Id.*

Forbes qualified under state law as a balloted candidate by obtaining thousands of signatures from registered voters in the district in which he was seeking office. ARK. CODE ANN. § 7-7-103(c)(1), (3); (Tr. 107-09 (K. Forbes) (testifying he obtained 6,000 signatures)) In doing so, Forbes signed up and prompted the registration of a number of young voters who had been disenchanted and had not planned to register or vote before meeting him. (Tr. 132-33, 135-36 (R. Forbes); Pl. Exh. 16, Tr. 135, 136) Soon thereafter, on August 24, 1992, and two months before the scheduled debate, Forbes requested by letter to be included in the government-sponsored debate as the only other certified, qualified candidate. (D. Ex. 11, Tr. 179, 197, App. 105a)

AETN believed it could, like a commercial station, exclude Forbes for any reason it wished, even for his viewpoints. (Tr. 206, 211, 238 (S. Howarth), J.A. 123, 125-26, 129-30) Howarth, the Executive Director and decision-maker, stated, "It was our understanding, my understanding . . . we could invite anyone to participate in the debate for whatever reason. It was our judgment, our editorial decision to make." (Tr. 238 (S. Howarth), J.A. 130) She decided to exclude Forbes. AETN decided to "stick with the major candidates" because it had heard stories about balloted candidates in other states who had no party endorsement. (Tr. 293 (A. Oliver), J.A. 140) Howarth notified Forbes he could not participate in the government's debate. (D. Ex. 12, Tr. 179, 205, App. 103a)

AETN developed and published an advertisement to promote the debate to voters and the public. The promotion asked the public, "Do you know *your candidates?*" and encouraged them to get better acquainted with "*the candidates,*" naming and picturing only the Republican and Democratic candidates and excluding Forbes. (Pl. Exh. 13, J.A. 174, Tr. 131-32, 267 (emphasis added)) Howarth defended the AETN statements despite the government's implicit message to the public that there were no other qualified candidates in the Third District. (Tr. 267-69 (S. Howarth), J.A. 135-37)

On the day of the debate, Forbes traveled to the AETN's studio to request inclusion and was confronted by Oscar Eugene Goss of AETN. Goss not only denied Forbes' request but also instructed the number of reporters who had assembled not to give Forbes any publicity. (Tr. 127-29, J.A. 85-87) The debate took place without Forbes. The winner of the race won by a margin of less than three percent. (D. Ex. 22, Tr. 179, 302, J.A. 172)

3. The Trial

At trial, AETN argued it had excluded Forbes because,

in Howarth's judgment, he was not a viable candidate and thus the viewers would not be interested in hearing from him. (Tr. 198-200, 212, 258, 269-70 (S. Howarth), J.A. 117-19, 126, 133, 136-38; Tr. 299, 304, 341, (A. Oliver), J.A. 144, 147, 153; Pet. Brief at 16) Despite AETN's extensive reliance in its brief to this Court on "newsworthiness" as its standard for exclusion, that term was never used by any of its witnesses as their basis.[2] Specifically, Howarth testified her basis was her judgment of whether Forbes had a "serious" or "reasonable chance to win." (Tr. 198-200, 212, 258, 269-70, J.A. 117-19, 126, 133, 137-38). More specifically, AETN's answer filed in the instant suit states Forbes was excluded because, in the judgment of AETN, "plaintiff [Forbes] was *not perceived* as a *viable candidate* . . . ." (D. Answer, filed July 11, 1994, ¶11 (J.A. 57) (emphasis added))

AETN proffered that it based its perception on factors such as the money Forbes raised, his campaign headquarters, popular support, media interest, and post-election results. Such criteria, however, were not applied to other candidates in any of the congressional debates. For example, in one of the other congressional debates, AETN invited an "unknown" candidate to participate despite his raising much less money than what AETN required of Forbes. (Pl. Exh. 21, Tr. 260, 264, J.A. 175; Tr. 260-61 (S. Howarth), J.A. 133-34) When questioned about this invitation, AETN's own witness, Howarth, conceded it was given because he was the Republican candidate, a factor that apparently trumped all other criteria applied to Forbes. (Tr. 260-61, 266, 269, J.A. 133-37) AETN considered Republicans

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[2] In its brief, AETN spends much time describing Forbes' private reminiscences of his campaign at the trial which took place a full three years after the exclusion. Such statements were, of course, not a basis for AETN's decision, and thus completely irrelevant. AETN and its employees, in fact, never interviewed or attempted to reach Forbes before excluding him. (Tr. 313 (A. Oliver), J.A. 148)

and Democrats viable regardless of their actual popular or media support. (Tr. 269, 271, J.A. 136-38) Support was assumed and inclusion in the debate thus automatic. It would not be surprising, therefore, that AETN would invite a Republican to its debate although the seat had never been won by a Republican in the history of the State of Arkansas. (Tr. 270, J.A. 137-38)

AETN treated Forbes differently, relying heavily on its conclusion that he did not have "popular" support, had low media interest, and would not be of interest to the viewers. (Tr. 201-02, 269, 271 (S. Howarth), J.A. 119-20, 136, 138; Tr. 293, 296, 298 (A. Oliver), J.A. 140, 142-44) Forbes' past election results, however, reveal clear public support and interest. In 1986, Forbes ran in a statewide race for the Arkansas Lieutenant Governor Republican Primary. He received 46.98 percent of the statewide vote. (Tr. 33 (A. Oliver), J.A. 153; Pl. Exh. 3, Tr. 113, 115, J.A. 169-70) In 1990, just two years before the 1992 AETN debate in question, Forbes ran again for Lieutenant Governor. In a three-candidate race for the Lieutenant Governor Republican Primary, he received 46.88 percent statewide. (Tr. 318-21 (A. Oliver), J.A. 149-51; Pl. Exh. 3, Tr. 113, 115, J.A. 169, 171) While he failed to win the runoff, his impressive showing in the statewide primary was particularly relevant to the 1992 race. Not only did he carry 46.88 percent statewide in a three-person race, but he also won a majority vote in 15 of the 16 counties comprising the congressional seat for which he was running in 1992.[3] *Id.*

Additionally, in checking for media and public interest, AETN never called Forbes and never called the two dominant television stations in the Third Congressional District. (Tr. 313 (A. Oliver), J.A. 148; Tr. 374-75 (C. Cannon), J.A. 158; Tr. 392-93 (B. Edson), J.A. 161-62; Pl. Exh. 25, Tr. 389, 390, J.A.

[3] It should be noted that in the last two Presidential elections the winning candidate won with less than 50 percent of the vote.

177; Pl. Exh. 26, Tr. 390, 391, J.A. 178) News Director Burnham Edson of KFSM-TV, in fact, stated Forbes had been on his station twice during the campaign and that there was good viewer response and interest. (Tr. 387-88, J.A. 160-61) News Director Craig Cannon of KHVS-TV stated his station also gave coverage to Forbes' candidacy, stressing the station's duty to enable the public to hear what "legitimate candidates" like Forbes had to say. (Tr. 380-82, J.A. 158-59) Cannon implied, in his journalistic opinion, Forbes should have been included in the debate.[4] (Tr. 377)

In determining the interests of its viewers, AETN apparently followed the advice of its own witness, who conceded, "there are no rules in journalism." (Tr. 306-07, J.A. 148)

SUMMARY OF THE ARGUMENT

AETN intentionally sponsored and convened a political debate, opening its property for public discourse by outsiders on the specific subject of the race for the Third Congressional District seat. It opened a limited public forum. Having done so, AETN may not exclude a speaker similarly situated in subject matter or the class of speakers without a compelling justification. Forbes, the only other balloted candidate in the race, was both in the class of speakers (candidates) and subject matter (who should win the race) of the forum. Arguments that a televised political debate is not a forum for public discourse

[4] Regarding AETN's argument that including Forbes in the debate would take away its air time, which is precious, it should be noted that some of that important air time included running reruns of "St. Elsewhere." (Tr. 127-28 (R. Forbes), J.A. 85-86,Tr. 353 (O. Goss)) Forbes testified he was told by Goss that if Forbes was allowed into the debate, AETN would run "St. Elsewhere" reruns instead of broadcasting the debate. *Id.* Goss later said it was a "[v]ery poor choice of words" and a misunderstanding, but conceded St. Elsewhere reruns were usually run for the same prime time of night as the debate. (Tr. 352-53 (O. Goss))

are untenable.

AETN asserts no compelling governmental interest in excluding Forbes. While it asserts a broad interest in complying with FCC regulations, it never contends the FCC required it to exclude Forbes from the debate. The FCC, of course, did not require any such action. Additionally, while AETN asserts a broad interest in providing educational television and maintaining journalistic discretion, it never asserts the exclusion of Forbes is necessary to meet such a broad interest. In fact, AETN retains its editorial discretion to schedule or not to schedule and to set the rules for conducting the debate, the time of the debate, whether it will be live, whether there will be audience, who will moderate, and any other editorial exercise. It simply may not discriminate against a balloted candidate. The legitimate government interests -- assuring public access to a diversity of information sources and respecting the right of the people of Arkansas to choose their own standards for candidate seriousness -- actually support Forbes' inclusion.

Even if political debates were to become non-public forums, AETN's actions are still in violation of the First Amendment as viewpoint discriminatory and unreasonable. AETN's very purpose in excluding Forbes was to provide more time and a platform to major-party candidates and their views and to exclude minor-party candidates and their views. Additionally, using party affiliation as a criterion, AETN discriminated on the basis of sets of political viewpoints and their acceptance to the public. Using popularity as a criterion for exclusion, AETN engaged in viewpoint discrimination on the basis of the alleged unpopularity of Forbes' views. This determination was also unreasonable in light of Forbes' recent election results.

Alternatively, even if forum analysis did not exist, AETN's actions violate the First and Fourteenth Amendments. Simply put, the government does not have the power to directly

influence an election by subjectively looking at individual candidates, determining their worthiness, and then conferring special benefits on the particular candidate or candidates it chooses. Free societies require free and fair elections. The crucial nature of the political speech involved in this case, the rights of voters, the rights of listeners, and the possible effect on the electoral process all mandate AETN's subjective interference in an election be struck down. Government infringements in such a sensitive area of freedom must meet objective, narrow, and definite standards. The people of Arkansas had already provided such an objective standard for candidate seriousness through years of legislative and judicial effort: its ballot access law. AETN simply ignored it.

ARGUMENT

I. AETN'S EXCLUSION OF FORBES FROM A LIMITED PUBLIC FORUM WITH NO COMPELLING JUSTIFICATION VIOLATES THE FIRST AMENDMENT.

AETN's exclusion of Forbes from a limited public forum without compelling justification violates the First Amendment. This basis alone is sufficient to support the Eighth Circuit's judgment.

A. Political Speech And Expression Have Been Granted The Fullest Extent Of Protection Under The First Amendment.

The authors of the First Amendment were aware "that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance." *Martin v. Struthers*, 318 U.S. 141, 143 (1943). First Amendment protection thus does not turn upon the "popularity" of the views or beliefs of the speaker. *New York*

Times Co. v. Sullivan, 376 U.S. 254, 271 (1964). The presupposition, instead, is "that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *Id.* at 270 (quoting Judge Learned Hand, *United States v. Associated Press*, 52 F. Supp. 362, 372 (D.C.S.D.N.Y 1943)). Freedom of political expression of a wide range of ideas is necessary for the government to be responsive to the will of the people and for the people to make political change peacefully and not unlawfully. *See New York Times*, 376 U.S. at 269; *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (stating "speech concerning public affairs is more than self-expression; it is the essence of self-government").

Debate by candidates for public office is thus at the very core of First Amendment protection and

> integral to the operation of the system of government established by our Constitution. The First Amendment *affords the broadest* protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Buckley v. Valeo, 424 U.S. 1, 14 (1976) (emphasis added) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

B. AETN's Government-Sponsored And -Planned Debate Was A Limited Public Forum From Which Forbes Was Improperly Excluded.

Three types of forums exist for First Amendment analysis of the exclusion of speakers from government property. The first type of forum is the traditional public forum. The public forum is a place such as a park or street which has "immemorially been held in trust . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators Ass'n*,

460 U.S. 37, 45 (1983). In a traditional public forum, the government may exclude a speaker "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

The second type of forum is the designated or limited public forum. A designated public forum is a government-created place or channel of communication "for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Id.* at 802; *see also International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992) (defining limited forum as "property opened for expressive activity by part or all of the public"). While the government is not required to retain the open character of this forum indefinitely, "as long as it does so it is bound by the same standards as apply in a traditional public forum." *Perry*, 460 U.S. at 45-46. The government thus must justify any exclusion by showing the necessity to serve a compelling governmental interest and proving that the exclusion is narrowly drawn. *See Cornelius*, 473 U.S. at 800.

By contrast, a non-public forum is property "which is not by tradition or designation a forum for public communication . . . ." *Perry*, 460 U.S. at 46. The government may exclude a speaker from a non-public forum as long as the exclusion is "reasonable in light of the purpose which the forum at issue serves;" *id.* at 49, and is not made to suppress the speaker's viewpoint. *See Cornelius*, 473 U.S. at 800.

Examples of forums this Court has held non-public include letterboxes, *see United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981); military bases, *see Greer v. Spock*, 424 U.S. 828 (1976); internal school mailboxes, *see Perry*; a funding drive in the federal workplace, *see Cornelius*; and prisons, *see Adderly v. Florida*, 385 U.S. 39

(1966). Examples of forums this Court has held to be limited open forums include university facilities opened for student groups, *see Widmar v. Vincent*, 454 U.S. 269 (1981); a theatre leased by a city and opened for productions, *see Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975); and a school board meeting limited to school business, *see City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Communications*, 429 U.S. 167 (1976).

The parameters of the forum involved in this case are easily defined by looking at the access Forbes sought. As stated in *Cornelius*, "in defining the forum we have focused on the access sought by the speaker." 473 U.S. at 801. Forbes sought access to the debate alone. He did not seek access to other programming or the station as a whole. AETN's attempt to characterize the forum as the whole station and all its programming is without merit. The Eighth Circuit correctly determined the forum at issue is the government debate alone. *Forbes II*, 93 F.3d at 503. Any other approach would strike down this Court's past limited forum cases. For instance, in *Widmar*, the forum to which the plaintiffs sought access was the student groups' use of university facilities. 454 U.S. at 265. If AETN's approach were allowed, the university could have simply stated the relevant forum was all its facilities, including its classrooms. Under such an approach, no limited forums could survive. Forbes claimed only a right to express his political viewpoints and to advocate for his election on equal terms with his competitors in a distinct and particularized forum. The relevant forum is thus the debate.

1. The Debate Was A Limited Public Forum.

In determining whether the government opened a limited forum, this Court looks to whether the government intended to open its property for public discourse.

> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.

Cornelius, 473 U.S. at 802. Forbes does not proffer "inaction" or "permission" of discourse in the instant case. The intent and action of the government could not be more clear. Government AETN conceived, staged, and broadcast the debate in question. Under its own factual recitation, it intentionally opened up governmental property for outsiders to engage in free expression and discourse in the limited context of a congressional debate. It opened a forum. Its position that the debate is a non-public forum is untenable.

AETN argues that the government's exercise of editorial discretion indicates it does not intend to open a forum. It says its decision to exclude Forbes, in fact all its speech decisions, are exercises of editorial discretion. A more broadly sweeping and circular argument can hardly be imagined. AETN is essentially requesting a *per se* rule that the government *never* intends to open a forum for public discourse as long as it exercises editorial discretion within the forum. Intent to maintain editorial discretion is not the test. Instead, intent to open its property for public discourse is the relevant inquiry.

The free exchange of ideas which occurred in AETN's live broadcast, without editorial constraint, constituted public discourse. In its essence, a debate requires a free exchange of ideas without complete government control. AETN was well aware that when it invited the outside candidates, it would not be able to edit, cut and paste, or control the content of the candidates' words as they came from their mouths. Additionally, political candidates' use of an open microphone for opening and closing remarks is public discourse, not editorial control.

If a government-sponsored and -planned debate is not a limited public forum, one can only wonder what is. If a quintessential limited public forum existed, it would be a political debate sponsored by the government. Because the debate was a government-created channel of communication for use by a certain class of speakers, the AETN debate is more akin to those forums found by this Court to be limited forums than to the letterbox, military base, internal school mailboxes, funding drive in the federal workplace, and prisons this Court has found to be non-public forums.

A final indication of whether a public forum exists is whether the nature of the forum in question is "compatib[le] with expressive activity." *Cornelius*, 473 U.S. at 802. AETN in its brief attempts to use this principle to its advantage in arguing Forbes' inclusion would not be compatible with the debate and would cause a disruption. AETN, however, twice misquotes this Court, adding the word "the" in front of "expressive activity" without notation.[5] (Pet. Brief at 21, 28-29) The result changes the question from whether, in this case, a government-sponsored debate is compatible with expressive activity -- in general -- to a question of whether the debate was compatible with Forbes' expressive activity.

Under either this Court's approach or AETN's, the answer is yes. A debate is unquestionably compatible with expressive activity. It is, in fact, created for the purpose of expressive activity. Unlike *Cornelius*, where the charity fund was not created for the purpose of expressive activity but to lessen expression and minimize disruption, the AETN debate was created for the specific purpose of expression. *Id.* at 805.

Additionally, Forbes' expression was directly compatible

[5] Forbes does not mean to imply AETN intentionally misquoted the Court for its advantage. Counsel for AETN has consistently been professional, ethical, and courteous in his dealings with Counsel for Forbes.

with a government-sponsored debate for the congressional seat for which he had qualified and was running. He was, in fact, the only similarly situated candidate who was excluded. He was compatible with both the subject matter being discussed as well as the genre of speakers.[6] *See Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (stating "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time"). The debate was a limited public forum, as the Eighth Circuit correctly held.

2. As A Similarly Situated Speaker, Forbes Was Improperly Excluded From AETN's Forum.

AETN also argues that since it selected only certain participants for its debate, the debate was not a public forum. (Pet. Brief at 24) It argues that "selective access" is not enough to establish a public forum. *Cornelius*, 473 U.S. at 805. This argument reveals a misunderstanding of the law.

Cornelius actually says selective access unsupported by a "purposeful designation" is insufficient to open a public forum. *Id.* As stated above, AETN purposefully designated its property for public discourse by outsiders. It planned a political debate for the exchange of ideas by candidates. It opened up its property. It did not select *all* the general public for the discourse. The forum was thus a limited public forum opened for a class of speakers or for the discussion of certain subjects.

[6] AETN argues that Forbes' inclusion would be a disruption because it would reduce the time of the other two qualified candidates. (Pet. Brief at 29) Governmental restriction of the speech of some "in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-91 (1978). While Forbes' expression was thus compatible with the debate, even if it had not been, AETN's basis for exclusion still would be invalid.

See id. at 802; *Perry*, 460 U.S. at 46 n. 7. AETN's argument would close all limited publicic forums, since all limited forums require selective access, whetther on the basis of subject matter or class of speaker.

AETN's argument thaat the debate was for selected candidates who were "newswworthy" in its eyes is thus also without merit.[7] The argumeent is, essentially, that since the government was attempting to o exclude Forbes, it did not create a forum. AETN thus spends mmuch time in its brief establishing its intent to exclude Forbes. TThis fact Forbes does not dispute. When the debate was planned,d, invitations were sent out to all the qualified candidates at thaat time. (Pet. Brief at 14) Two months later, Forbes qualifiedd. *See id.* AETN then had a decision to make. Its intent toto exclude him does not alter the reality, however, that it createed a limited public forum for the congressional debate.

AETN's use of its inteent to exclude to prove that no forum existed is a circular argument that would, in effect, end the limited public forum as a protection for speech. The government could open a forumm and then carve out any specific individuals it desired to excludle, despite their being in the class of speakers or subject matteer of the forum. The Arkansas debates here were clearly f forums opened to certain speakers (congressional candidatess) for the discussion of certain subjects (who should be electedd). Forbes qualifies under either limiting factor.

As statated in *Perry*, "[w]hen speakers and subjects are similarly situuated, the State may not pick and choose." 460 U.S. at 55. Fcorbes, in fact, was the only one so similarly situated, having g qualified as a balloted candidate under state law. The

[7] Again, while AETN consistently argues in its brief that its forum was specifically only for "newsworthy" candidates, this is a term never used by any of its witnesses at trial as the basis for Forbes' exclusion.

instant case is similar to this Court's decision in *Southeastern*. In *Southeastern*, the city was not originally required to open the municipal facility for theatrical productions. When it did, however, it created a limited public forum. The city could not thus exclude one speaker (theatre group) from the forum because it was "in the best interest of the community." *Southeastern*, 420 U.S. at 549, 552-53. Such a subjective exclusion provided unbridled discretion over speech to a government official and was unconstitutional. *See id.* at 553.

Likewise, AETN did not have to organize the instant congressional debate. Yet, it did. Having done so, it may not exclude a speaker similarly situated without a compelling justification. "Non-viability," or even "newsworthiness," is an insufficient and subjective standard which does not meet First Amendment requirements.

Under AETN's approach, *Southeastern* would have been decided differently. The forum would have been a non-public forum because the city's intent of selective access was to allow clean and healthy plays "in the best interest of the community." *Id.* at 549. The *Widmar* decision would also be changed. The University would be held to have opened only a non-public forum for non-religious groups, despite the religious groups' being otherwise similarly situated. AETN's position is not the law. Like the University in *Widmar*, once the government opens a forum for public discourse, unequal treatment is constitutionally suspect and must meet strict scrutiny.[8] *Id.* at 267, 269-70.

AETN's inference that Forbes could have spoken

[8] AETN's attempt is actually very clever. Instead of carrying its burden in attempting to show "non-viability" or "newsworthiness" is a compelling governmental interest, it tries to redesign the forum, using its alleged compelling governmental interest as a requirement for the creation of the forum.

somewhere outside the debate forum is without merit.[9] Once the government excludes a speaker who would otherwise be included in a designated forum, the government must show "the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius*, 473 U.S. at 800. Exclusion is thus not justified on the basis that the speaker may have exercised his or her rights in some other place or time. *See Southeastern*, 420 U.S. at 556; *Schneider v. State*, 308 U.S. 147, 163 (1939) (holding "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). Additionally, any other alleged alternative for communication would not have provided the unique opportunity for Forbes to challenge his opponents, face to face, in a live contest, to woo potential voters.

Finally, AETN encourages this Court not to find the debate a limited public forum because doing so might lead to a flood of candidates with requests or create a cacophony which would disrupt the debates or other programs. (Pet. Brief at 28) This argument is invalid. First, AETN does not offer these fears as a compelling governmental interest but as a policy reason to encourage this Court not to find a forum existed. The determination of the existence of a forum, however, is to be based on the specific acts and intent of the government, not any inconvenience the government proposes might occur because of its action. *See Cornelius*, 473 U.S. at 802. Second, no potential flood of candidates or basis for any other of AETN's fears

[9] Forbes made numerous requests for equal treatment and time to respond to his opponents. (Tr. 123-24, 140, 163-64, 173 (R. Forbes), J.A. 85, 101-02, 107) AETN, however, refused to inform Forbes of any right to "reasonable access" or any right he had to respond unless he used the "magic words," as his witness testified. (Tr. 351, 355-56 (O. Goss), J.A. 155-57)

existed, nor were any such facts entered into evidence.[10] The facts are clear that the only person excluded from the government debate was Forbes. "Mere speculation of harm" and "undifferentiated fear of . . . disturbance" are not enough to overcome freedom of expression. *Grayned*, 408 U.S. at 117; *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 543 (1980). Such theoretical harm is thus neither a compelling governmental interest nor narrowly tailored.

Third, presentation of a diversity of viewpoints is favored by and a purpose of our First Amendment. Despite AETN's exaggerated fears of a cacophony resulting from the expression of a diversity of viewpoints, this Nation has decided to promote political diversity as a value in itself. Ironically, AETN's own policy proffers its purpose as being to enhance the public's access "to the full range of ideas and viewpoints" for voters. (App. 100a) This Court rejected a similar argument in the *City of Madison* case, which also centered around a limited public forum. State law prohibited teachers, other than union representatives, to speak at school board meetings if their speech was addressed to pending collective bargaining matters. *City of Madison*, 429 U.S. at 169. The Supreme Court of Wisconsin upheld the law on the basis that the speech infringement was justified to avoid dangers of disruption and chaos in labor management relations. *Id.* at 173. This Court, however, struck the law down, noting it discriminated against categories of speakers. *Id.* at 175-77. AETN's speculative fears, therefore, are unavailing. They argue against the protection of diversity and minority expression and are insufficient as reasons for

[10] In fact, in the last 25 general elections for the U.S. House of Representatives, an average of only 75 independent or minor-party candidates per election have sought a seat in the 435 congressional districts. *See Congressional Quarterly Almanac*, and *Congressional Quarterly Weekly Report*, 1948-96. Therefore, on average, only one out of six congressional districts have even one third-party candidate on a ballot; this is hardly a cacophony or flood of candidates.

exclusion. *Cf. Martin*, 318 U.S. at 143 (holding unconventional speech disturbs, but must be protected); *New York Times*, 376 U.S. at 271 (holding First Amendment presupposes that right conclusions are better reached by multitude of voices).

Contrary to AETN's parade of horribles, the limiting principle to the Eighth Circuit's decision is easily defined. Its decision applies only to candidate debates sponsored and planned by government-owned and -operated stations.[11] Only such debates invite outside, specific, private individuals (candidates) to engage in public discourse on a specific subject matter (campaign issues), knowing the government will not be able to control or edit the words or views of the candidates. In the instant case, the boundary is even tighter as only qualified candidates, those who to have passed the State's threshold test for seriousness, would have access.

What AETN requests is, on the other hand, without

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[11] As Judge Clark explains,

> "[T]he decision to show or not to show a particular program or documentary and the ideas contained therein is very unlike the decision to exclude political parties from a debate. The positions put forward in a particular television program may find equally effective expression through a wide variety of media. I would not contend, therefore, that when the state shows a documentary it must include all viewpoints in that documentary. But an idea is not a candidate, and freedom of speech has greater meaning in the election arena. There is only one way for candidates themselves to argue their positions with each other: through the medium of a debate. A debate serves to inform the public far more effectively than any candidate's lone appearance could, by creating a synergism between the candidates' immediately conflicting positions.

Chandler v. Georgia Pub. Telecomms. Comm'n, 917 F.2d 486, 493 (11th Cir. 1990).

boundaries. If the government debates were not limited forums, then the government could exclude candidates on any basis it wished, except viewpoint. If African-American, religious, or female candidates had a general history of not performing well in a district, the new newsworthy standard would, in fact, encourage their exclusion for lack of public support or viability. Such candidates would have no recourse under First Amendment forum analysis.[12]

C. AETN's Exclusion Of Forbes Is Not Justified By Any Compelling Government Interest.

Having improperly excluded Forbes from a limited public forum, AETN must prove the exclusion was necessary to meet a "compelling" interest and was narrowly drawn to achieve that interest. AETN's proffered compelling interests fail to meet this strict scrutiny.

In its presentation of two alleged compelling interests, AETN attempts subtlely to change the focus of the inquiry to one broader than appropriate. AETN argues it has compelling interests in complying with Federal Communication Commission ("FCC") regulation and in exercising journalistic discretion over all its programming. The proper question, however, is whether AETN had a compelling interest requiring it to exclude Forbes from the debate. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 224 (1972) (holding the question was whether government had a compelling interest in not providing an exemption to Amish plaintiffs for the one or two years of schooling in question, not whether it had an interest in education as a whole); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 719 (1981) (holding question of compelling interest is properly

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[12] Reduction in protections under limited public forums would have a strong impact on religious speakers and groups who rely heavily on this forum for protection of their religious speech. *See, e.g., Widmar v. Vincent*, 454 U.S. 269 (1981).

narrowed to whether actual harms, not speculated harms unsupported by evidence in the record, were imminent). AETN asserts no compelling interest in excluding Forbes from the debate.

1. AETN Fails To Prove A Compelling Interest Through The FCC.

AETN asserts a compelling interest in conforming with the requirements of the FCC. AETN, however, nowhere asserts that including Forbes would have been non-compliance with the FCC. In fact, AETN's Executive Director specifically stated there was no FCC regulation or criterion saying it could, much less had to, exclude Forbes from the debate. (Tr. 229-30) AETN cites no case or example where a licensee lost its license, or was confronted by the FCC, for including what it considered a "non-viable" or "non-newsworthy" candidate on a television debate. Even if the FCC had required Forbes' exclusion, which it clearly did not, that requirement would still be an insufficient basis to override a First Amendment violation. Complying with a government statute cannot be a basis for overriding a First Amendment right. If it were, the Constitution would be nullified by governmental statutes.

As the FCC itself has recognized, it is bound by the First Amendment. *See In re KMAP, Inc.*, 72 F.C.C.2d 241, 244 (1979). AETN thus cannot use compliance with the FCC to overcome the First Amendment. Also, the FCC has a longstanding policy of deferring to licensee discretion. *See In re Right to Life, Inc. v. WAVE-T.V.*, 59 F.C.C.2d 1103 (1976). Complying with the FCC in this case thus means AETN could do whatever it wishes.

2. AETN Fails To Prove A Compelling Interest Through Educational Programming And Journalistic Discretion.

AETN also asserts a compelling interest in providing educational television, which it says is dependent on journalistic expression. AETN again, however, nowhere explains why the exclusion of Forbes was required to accomplish such a compelling interest. It, of course, was not. The very purpose, in fact, for the creation of the public broadcasting system was to bring greater diversity to programming, often by supplementing commercial broadcasting that might appeal only to limited audiences. *See* JAMES B. CONANT ET AL., THE REPORT OF THE CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION, PUBLIC TELEVISION: A PROGRAM FOR ACTION 13-14 (1967). AETN's own policy states its purpose is to

> further the goals of a democratic society by enhancing public access to the full range of ideas and viewpoints required for citizens and voters to make informed judgments about the issues of our day.

(D. Ex. 4 §10, Tr. 179, 186 (App. 100a)) Excluding the third and only other set of views from a political debate does not serve such purposes.

Additionally, Forbes has never advocated taking away AETN's journalistic discretion. AETN remains free to schedule or not to schedule debates and to set the rules for conducting the debate, the time of the debate, whether it will be live, whether there will be an audience, who will ask the questions, and any other editorial exercises. It simply may not discriminate against qualified and balloted candidates.

AETN is actually seeking not to be bound by the First Amendment and to exercise discretion at all times without

restriction. In arguing that it should have complete journalistic independence without restriction, AETN cites this Court's opinion in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, ("*CBS v. DNC*"), that the "concept of journalistic independence could not co-exist with a reading of the challenged conduct of the licensee as government action." 412 U.S. 94, 121 (1973); (Pet. Brief at 30). Yet, read in context, this statement explicitly contradicts AETN's requested boundless journalistic discretion. In *CBS v. DNC*, *private* entities filed suit against *private* broadcast stations for alleged violations of FCC regulations and the First Amendment. 412 U.S. at 97. In trying to apply the First Amendment to the defendants, plaintiffs argued defendants were state actors. In concluding private broadcasters were not state actors, this Court looked at the "concept of private, independent, broadcast journalism" and stated "[t]hat concept of journalistic independence could not co-exist with a reading of the challenged conduct of the licensee as governmental action." *Id.* at 121. Simply put, if the broadcasters are state actors, the First Amendment precludes them from having unfettered journalistic discretion.

The Court could hardly deal with this issue more clearly. If a broadcaster is a state actor, complete journalistic independence "could not co-exist." *Id.* AETN is a state-owned and -operated television network. It is undisputedly a state actor. Unlike a private broadcaster, it thus does not have unfettered independent journalistic independence. Such is the difference between being protected by the Constitution, as a private broadcaster is, and being bound by it, as is AETN.

If any compelling interests exist, they are in fact furthered by including Forbes in the debate. First, the discretion sought by AETN to exclude Forbes is the discretion to override the decision of the people of Arkansas as to who is "politically viable." The people have an interest in preserving the integrity of the political process and have already provided limitations on

candidates to control ballot congestion and frivolous candidacies. *See Williams v. Rhodes*, 393 U.S. 23 (1968); *Lendall v. Bryant*, 387 F. Supp. 397, 402 (E.D. ARK. 1975). In Arkansas, the statutory standards for qualifications are the product of years of legislative and judicial refinement. *See Lendall*, 387 F. Supp. at 402 (invalidating ballot access law for independent candidates requiring fifteen percent of eligible voters); 1975 ARK. ACTS NO. 700 § 1 (reducing required petitions to ten percent); *Lendall v. Jernigan*, 424 F. Supp. 951 (E.D. ARK.), aff'd 433 U.S. 901 (1977) (invalidating 10 percent petition requirement); 1977 ARK. ACTS NO. 731, § 1 (reducing required petitions to three percent and extending filing deadline); *Rock v. Bryant*, 459 F. Supp. 64 (E.D. ARK.), aff'd 590 F.2d 340 (8th Cir. 1978) (sustaining qualifications).

Forbes clearly met the pre-established statutory qualifications for candidacy, which were designed "to avoid or at least minimize confusion and frustration at the polls." *Rock*, 459 F. Supp. at 73. He secured signatures from the over 2,000 electors required in Arkansas' Third Congressional District. ARK. CODE ANN. § 7-7-103 (c)(1), (3); (Tr. 107-09 (K. Forbes) (testifying Forbes received 6,000 signatures))

AETN thus seeks discretion to allow one unelected government official to override the standard for viability that has been painstakingly developed through the years by the people of Arkansas. This objective standard set forth ahead of time and by the people is much preferable to the governmental discretion sought by AETN. If a compelling interest exists here, it supports the people's right to choose their own candidates and standards for candidate viability.

Additionally, this court recently held there is a government purpose "of the highest order" in assuring the public has access to a multiplicity of information sources. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 663, (1994) ("*Turner I*"). Excluding the third and last set of candidate views from a

political debate is contrary to this important governmental interest. Not only does AETN not have a compelling interest justifying its exclusion, but its actions actually violate important governmental purposes set forth by this Court in interpreting the First Amendment.

3. AETN's Exclusion Is Not Narrowly Drawn.

Finally, AETN's exclusion of Forbes was not narrowly drawn. The criteria it used for exclusion, "non-viability," or even "non-newsworthiness," are subjective criteria and thus not narrowly drawn to effectuate any compelling interest. As the Eighth Circuit noted, AETN has conceded its criteria are ultimately "essentially subjective." *Forbes II*, 93 F.3d at 504. Additionally, this Court has stated that evaluating newsworthiness requires analysis of the substantive message. *See Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984). Such subjective criteria are thus not objective and narrow standards tailored to avoid First Amendment infringement in meeting any governmental interest. Even if the government were seeking to meet a substantial purpose, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). A much more narrow, as well as objective, means of determining the viability or seriousness of a candidate would be to use the law which the people of Arkansas had already set forth for ballot access.

AETN's exclusion of Forbes from a limited public forum with no compelling justification to which the exclusion is narrowly drawn violates the First Amendment. The Eighth Circuit's judgment was correct and should be upheld.

II. REGARDLESS OF THE NATURE OF THE FORUM, AETN'S EXCLUSION WAS VIEWPOINT DISCRIMINATION AND UNREASONABLE IN VIOLATION OF THE FIRST AMENDMENT.

As a separate and additional First Amendment violation, AETN's actions were viewpoint-discriminatory and unreasonable. Even in a non-public forum, the government may not exclude a speaker on the basis of viewpoint, and its restriction on speech may not be unreasonable. *See Cornelius*, 473 U.S. at 811. When the government elects to subsidize private speakers, it must do so in a viewpoint neutral manner. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, ___ U.S. ___, 115 S.Ct. 2510, 2516 (1995). The government "may not favor one speaker over another." *Id.*; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). AETN violated this important prohibition.

This Court has stated it has an obligation to "make an independent examination of the whole record" to ensure that there is no "forbidden intrusion on the field of free expression." *New York Times*, 376 U.S. at 284-86. This independent review specifically applies to judgments regarding viewpoint neutrality. *See Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 505 (1984) (holding "[t]he principle of viewpoint neutrality that underlies the First Amendment itself . . . also imposes a special responsibility on judges whenever it is claimed that a particular communication is unprotected"). Examination of the record and AETN's own arguments reveal viewpoint discrimination.

A. Subjective Animus By The Government Is Not Required.

The jury below was asked and found that Forbes was not excluded "because of *objections or opposition to* his views." (App. 23a (emphasis added)) This question does not, however, end the First Amendment inquiry regarding viewpoint discrimination. While one of AETN's employees gratuitously

offered her opinion that Forbes was a member of the "American Nazi Party," (Tr. 295 (A. Oliver), J.A. 142) and another told him AETN would rather run reruns of "St. Elsewhere" than air the debate including Forbes, (Tr. 127-29 (O. Goss), J.A. 85-87), such subjective opposition or hostility is not necessary to establish a viewpoint-based exclusion. Illicit intent or bad motive is sufficient, but it is not necessary. *See Minneapolis Star & Tribute v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991); *Turner I*, 512 U.S. at 685. The question is simply whether the government's actions restricted speakers in a way that favors some viewpoints over others. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (stating "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others") (quoting *Taxpayers for Vincent*, 466 U.S. at 804). AETN's restriction of Forbes was certainly a government action based upon the exclusion of minority viewpoints for the benefit of majority viewpoints.

B. AETN's Actions And Exclusion Criteria Are Viewpoint Discriminatory And Unreasonable.

AETN violated the First Amendment prohibition against viewpoint discrimination and unreasonableness in at least four separate ways. It created an unfair political advantage favoring certain congressional candidates at the expense of another, and it based its exclusion upon its impermissible determination of Forbes' popularity, his wealth and fund-raising ability, and his supposed non-viability as a candidate.

1. AETN's Exclusion Created A Political Advantage For Certain Candidates At The Expense Of Another.

Striking at core political speech protections of the First

Amendment, AETN impermissibly used the power and authority of government to endorse or disfavor a candidate or candidates. Such use of power to give one side of a political debate an advantage to express its views to the public while restricting the other side amounts to viewpoint discrimination. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (holding it is impermissible to "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978) (holding it is impermissible "to give one side of a debatable public question an advantage in expressing its views to the people"); *Rosenberger*, 115 S.Ct. at 2548-49 (Souter, J., dissenting) (noting it is impermissible for government "to allow one message while prohibiting the messages of those who can reasonably by expected to respond").

AETN gave two sides of a political debate a televised platform for public expression while suppressing the only other side to the contest. AETN's actions directly fit the definition for viewpoint discrimination, whether or not it did so to "oppose" or "object to" Forbes' views. In its own brief before this Court, AETN states its goal was to present "*the views* of the candidates in whom the viewing audience was most interested," (Pet. Brief at 29 (emphasis added)), and thereby reveals its decision was viewpoint-based.[13]

The *Rosenberger* decision presents an excellent example of similar viewpoint-based discrimination. The Court nowhere required proof that the University of Virginia restricted the students' speech and money because it was hostile, or opposed, to the religious speakers. Yet, this Court still found viewpoint discrimination as the government's basis. *Rosenberger*, 115 S.Ct. at 2525. The four-Justice dissent also would have found

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[13] Further, as AETN states in its brief to the Eighth Circuit Court of Appeals, "[a]s a practical and foreseeable matter, the decision screened out the viewpoints of all but the major party candidates." (J.A. 216)

viewpoint discrimination if debate had been skewed in favor of one side or another instead of all sides. *Id.* at 2549-51 (Souter, J., dissenting). Setting forth a definition of viewpoint discrimination, the dissent explained,

> [i]t is precisely this element of taking sides in a public debate that identifies viewpoint discrimination and makes it the most pernicious of all distinctions based on content. *Thus, if government assists those espousing one point of view, neutrality requires it to assist those espousing opposing points of view, as well.*

Id. at 2549 (emphasis added). AETN clearly violated this requirement of neutrality. The government assisted two of the three qualified candidates to espouse their views, but specifically banned the third.

The major-party candidates received free coverage and promotion of their views, all at government invitation and expense. The one and only other side of the debate who could reasonably be expected to respond, the only other qualified candidate, was denied such benefits. Moreover, AETN's two-candidate debate communicated a message to the public of a generalized government endorsement of the major-party candidates and, by extension, a non-endorsement or disapproval of Forbes. Such favoritism was also buttressed by AETN's newspaper advertisement, which stated, "Do you know *your candidates?*" and encouraged the public to get better acquainted with "*the candidates*," naming and picturing only the Republican and Democrat. (Pl. Exh. 13, J.A. 174) AETN's actions amount to a government endorsement of two of the three qualified candidates for office, by both its advertisement and its presentation of only two candidates to the public. Such discrimination among sets of political viewpoints is constitutionally prohibited.

AETN's message to the public was clear: Forbes is not a legitimate candidate. Such governmental breaches of neutrality in a political campaign are exactly what viewpoint discrimination prohibitions are designed to prevent.

2. AETN's Use Of "Popularity" As An Exclusion Criterion Is Viewpoint Discriminatory And Was Unreasonably Applied.

AETN's exclusion on the basis of "popular" support is also unconstitutional viewpoint-based discrimination and an unreasonable basis for its exclusion of Forbes. Popularity is specifically and inherently based on the public's likes and dislikes of the views expressed by the candidates. It is unquestionable that the government may not premise its restriction of free expression on the unpopularity of the speaker's views. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) (stating "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *New York Times*, 376 U.S. at 271. AETN's use of "popular" support as a basis for excluding Forbes is simply a government restriction based upon response to his views and is thus viewpoint-based.[14]

AETN attempts to shield itself from the First Amendment by hiding behind its perceptions of what the public wants. AETN contends it is not its own view of Forbes' campaign message but the campaign message's "popular" support upon which it bases its decision. The public reaction or response to a message, however, depends on its content and

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[14] A term such as "newsworthiness" is likewise based on the substantive message of the speaker and thus a discriminatory basis. *See Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984); *Chandler*, 917 F.2d at 494 (Clark, J., dissenting) (finding newsworthiness "viewpoint discrimination").

viewpoint and is categorically not a valid basis for restricting free expression. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Texas v. Johnson*, 491 U.S. at 412; *Boos v. Barry*, 485 U.S. 312, 321 (1988).[15] AETN's basis is, therefore, impermissible under the First Amendment. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).[16]

In addition, even if AETN's viewpoint discrimination were ignored, its application of the "popular support" standard was unreasonable. Despite its attempts to convince this Court that Forbes had "no popular support," the facts of Forbes' political career belie such assertions. In 1986, for instance, Forbes won 46.98 percent of the vote in a statewide race for the Arkansas Lieutenant Governor Republican Primary. (J.A. 153, 169-70) Two years before the 1992 AETN debate, Forbes ran again for Lieutenant Governor. In this three-candidate race for the Republican Primary, he won 46.88 percent statewide. (J.A. 149-151, 169, 171) In fact, in this race, Forbes carried a majority vote in 15 of the same 16 counties in the Third Congressional District. Two years later, AETN banned him from its debate for the congressional seat in this very district. AETN did not even speak to Forbes or the two dominant television stations in the Third Congressional District, nor did it ask about his popular support. (J.A. 148, 158, 161-62, 177-78) Such convenient analysis illustrates why one unelected

[15] AETN's infringement goes even further than these cases by basing its exclusion on its perception of Forbes' popular support. Even more subjective power is thus wrested by the government.

[16] In contrast to "popular" support, ballot qualification is not a facade for viewpoint discrimination. The Arkansas law under which Forbes qualified operates as a sieve that blocks "frivolous political office seekers," *Rock v. Bryant*, 459 F. Supp. 64, 73 (E.D. ARK. 1978), yet does not discriminate on the basis of viewpoint.

government official should not have the subjective and standardless discretion requested by AETN over such a crucial matter as the exclusion of a qualified, balloted candidate from a government-sponsored congressional debate. A reasonable person would not have sidestepped these historical facts nor failed to contact key sources of information. Thus, AETN's application of its own impermissible standard was not reasonable.

3. AETN's Use Of Wealth And Fund-Raising Capacity As Exclusionary Criteria Was Illegitimate And Unreasonable.

This Court prohibits the government from using wealth and fund-raising ability as a threshold requirement for political office. Specifically, "[t]he First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability . . . ." *Buckley*, 424 U.S. at 49. In fact, the First Amendment prohibits "a system so heavily weighted in favor of the financially affluent, or those with access to wealth." *CBS v. DNC*, 412 U.S. at 123. Yet, Forbes' lack of personal wealth to finance his campaign was one of the major factors set forth by AETN to justify its exclusion. (Pet. Brief at 15, 33) Government censorship of a speaker, much less a qualified candidate for office, on the basis of financial status is impermissible. *See Bullock v. Carter*, 405 U.S. 134 (1972); *Morse v. Republican Party of Va.*, ___ U.S. ___, 116 S.Ct. 1186 (1996). AETN's denial of access to a political debate was unreasonable, since it was based upon an unconstitutional criterion.

4. AETN's Use Of Partisanship And Viability As Exclusion Criteria Is Viewpoint Discriminatory And Unreasonable.

A central basis for AETN's exclusion of Forbes was his perceived viability as a political candidate. While AETN on appeal posits "newsworthiness" as its standard for exclusion, it is a term used by none of its witnesses at trial as the basis for exclusion. Instead, AETN testified it excluded Forbes because he was not a viable candidate and thus viewers would not be interested in hearing from him. (J.A. 117-19, 126, 133, 136-38, 144, 147, 153) More specifically, AETN's answer filed in the instant suit states Forbes was excluded because, in the judgment of AETN, "plaintiff [Forbes] was not perceived as a viable candidate . . . ." (J.A. 57) The unanimous Eighth Circuit panel concluded the basis or "reason given" for Forbes' exclusion was whether AETN "considered Forbes a viable candidate." *Forbes II*, 93 F.3d at 504.

AETN's assessment of viability impermissibly discriminated on the basis of party affiliation. AETN automatically considered major-party candidates viable. Other candidates were not. The network's own witnesses, including its Executive Director, conceded Republicans and Democrats were treated differently from Forbes solely because of their party and AETN's consequential assumption of support. (J.A. 133-35, 137-38, 140) For instance, Forbes was required to prove monetary and actual "popular" and media support in order to prove his viability. In one of its other congressional debates, however, AETN invited an "unknown" candidate to participate despite his not having raised as much money as Forbes and without AETN's requiring any actual public or media support. (J.A. 133-34, 136-38, 175) When questioned, AETN's own Executive Director conceded he was automatically included because he was the Republican candidate. (J.A. 133-37) For major-party candidates, support was assumed even if it did not exist or the candidate was an unknown.

A political party is, at its base, a group of individuals associated on the basis of their political views. To discriminate on the basis of party affiliation is, therefore, to discriminate

against a set of views. Governmental exclusion from a political debate on the basis of party affiliation is thus viewpoint discrimination. *See, e.g., Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, ___ U.S. ___, 116 S.Ct. 2374, 2399 (1996) (Stevens, J., concurring) (stating "[i]f the Government spared all speech but that communicated by Republicans from the control of the cable operator, for example, the First Amendment violation would be plain"). Similarly, as Judge Clark stated, "a decision that excludes the Libertarians based on the fact that their views are less newsworthy than those of the major-party candidates is necessarily based on an estimation of the value and substance of their views [and thus] viewpoint discrimination . . . ." *Chandler v. Georgia Pub. Telecomm. Comm'n.*, 917 F.2d 486, 494 (11th Cir. 1990) (Clark, J., dissenting), *cert. denied*, 502 U.S. 816 (1991).

AETN even states in its brief before this Court that it excluded Forbes to give more time to the "serious," major-party candidates. (Pet. Brief at 14) The idea that

> government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure the widest possible dissemination of information from diverse and antagonistic sources . . . ."

Buckley, 424 U.S. at 48-49 (quoting *New York Times*, 376 U.S. at 266); *Bellotti*, 435 U.S. at 790-91.

In fact, this Court has held that the mere appearance of such governmental partisanship is impermissible. In *United States Civil Service Commission v. National Association of Letter Carriers*, this Court stated,

> it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they *appear to*

> *the public* to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.

413 U.S. 548, 565 (1973) (emphasis added). The Court thus upheld restrictions on the First Amendment freedoms of federal employees. It would be untenable if government employees could be restricted in their First Amendment rights to avoid an "appearance" of partisanship, and yet the government itself could engage in open favoring of certain parties or candidates on television before the public. AETN's viewpoint discrimination in the instant case thus provides another separate basis in support of the Eighth Circuit's judgment.

Arguments that since the government is airing the program, government is the speaker and thus viewpoint discrimination does not apply are without merit and disingenuous. The very essence of the debate in question was public discourse by *private speakers*. When private speakers and expression are involved, unlike when only government is speaking, the First Amendment applies. *See CBS v. DNC*, 412 U.S. at 139 and n. 7 (Stewart, J. concurring). Otherwise, for instance, as in the instant case, the government could hold political debates across the country engaging in viewpoint discrimination on any basis it desired, excluding all "conservative" or "religious" candidates, or just those who advocate funding public television. When government restraint involves private expression, viewpoint discrimination is prohibited.

III. AETN'S ACTION INFRINGED UPON CORE POLITICAL SPEECH AS WELL AS VIOLATED CONSTITUTIONAL PROHIBITIONS AGAINST GOVERNMENTAL USE OF SUBJECTIVE DISCRETION TO SUPPRESS FREE SPEECH.

Political speech of a candidate is at the core of the First Amendment, and its freedom from government coercion and censorship is a necessity for any truly free democratic society. AETN seeks the unbridled power subjectively to determine which candidates are worthy to participate in government-sponsored and -planned debates. Such power is dangerous because it effectively allows the government subjectively to influence the outcome of an election. The First and Fourteenth Amendments prohibit such subjective power being placed in the hands of government officials. Therefore, even absent forum analysis, such core liberties may not be infringed by the government's use of subjective and unfettered discretion.

A. The Nature Of Forbes' First Amendment Rights Requires Heightened Protection.

A "major purpose" of the First Amendment is to protect from government censorship the free discussion of issues by candidates. *Buckley*, 424 U.S. at 14. Government encroachments on such speech, therefore, trigger the First Amendment's "fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)); *Buckley*, 424 U.S. at 15. Debate by candidates for public office goes to the very core of the First Amendment and receives "the broadest protection . . . ." *Buckley*, 424 U.S. at 14. Forbes' right to challenge his political opponents' views in a government-sponsored debate deserves the fullest, most urgent, and broadest protection under the First Amendment.

AETN's actions impinge not only upon Forbes the candidate but upon voters as well. For decades, this Court has recognized the "right to equal treatment in the voting process." *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 34 n.74 (1973). The "rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates

always have at least some theoretical, correlative effect on voters." *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (quoting *Bullock*, 405 U.S. at 143). Since voters can exercise their preferences only through candidates or parties, exclusions of candidates affect their rights to cast their votes in accordance with their beliefs. *Id.* at 787. Excluding Forbes because he was not "popular" or a majority figure, in the government's opinion, thus impacted not only many people who had previously voted for him, (Pl. Exh. 3, Tr. 113, 115, J.A. 169-171), but all those holding non-majority views who would have wished to associate with his views in the current election.

The undoubted effect of AETN's approach is to exclude minority voices and viewpoints. Even if third-party candidates do not win, their campaigns often educate the public, advance creative and sometimes unpopular ideas, protest the current political order, and even influence the outcome of the election for the other candidates. (J.A. 172 (reporting the instant 1992 congressional race was decided by less than three percent of the vote)) An election campaign is as important in its dissemination of ideas as is the actual election of a candidate. A systematic process that excludes such minority voices flies directly in the face of the First Amendment. *See Lee*, 505 U.S. at 702 (Kennedy, J., concurring) (stating government is not "to tilt the dialog[ue] heard by the public, to exclude many, more marginal, voices"). As Justice Douglas argues, the First Amendment does not permit

> broadcasting - now our most powerful media - [to] be used to subdue the minorities or help produce a Nation of people who walk submissively to the executive's motions of the public good.

CBS v. DNC, 412 U.S. at 167 (Douglas, J., concurring). This Court, in fact, has stated there is an important governmental interest in promoting dissemination of ideas from a multiplicity

of sources. *See Turner Broad. Sys., Inc. v. FCC*, ___ U.S. ___ (1997) (slip op. at 6). Even the right of free speech of a *private* broadcaster "does not embrace a right to snuff out the free speech of others." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387 (1969).

Moreover, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* at 390; *see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976) (noting "[f]reedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both"). The consequence of AETN's exclusion of Forbes thus also collides with the rights of viewers. Viewers and their party candidates are shackled by a government system of exclusion of minority voices. AETN's own policy even suggests the importance of protecting such minority views to

> further the goals of a democratic society by enhancing public access to the full range of ideas and viewpoints required for citizens and voters to make informed judgments . . . .

(App. 101a)

How many of Forbes' past substantial number of voters, (P1. Exh. 3, J.A. 169-71), were encouraged by the government's message to switch their vote from Forbes? How many were deceived into thinking Forbes was not a qualified candidate? No one will ever know. But the chances that governmental power tipped the scale of the electoral process and influenced the outcome of this election are very real.[17]

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[17] AETN's suppression is particularly injurious in light of the "electorate's increasing dependence on television, radio, and other mass media" as "indispensable instruments of effective political speech." *Buckley v. Valeo*,

As this Court has recognized, the people are the best "judges of who ought to represent them." *Powell v. McCormack*, 395 U.S. 486, 541 n. 76 (1969) (citing 2 DEBATES ON THE FEDERAL CONSTITUTION 292-93 (J. Elliot ed. 1876)). "[E]ach person should decide for him or herself, the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest on this ideal." *Turner I*, 512 U.S. at 641; *Denver Area*, 116 S.Ct. at 2405 (Kennedy, J., concurring in part, dissenting in part). The people of Arkansas have already decided which persons are viable candidates by establishing official ballot thresholds. ARK. CODE ANN. § 7-7-103(c)(1). One unelected government official may not subsequently disqualify a candidate by substituting his or her own perception for that of the people of Arkansas. Whether Forbes was ultimately viable or not was "a judgment to be made by the people of the Third Congressional District, not by officials of the government in charge of channels of communication." *Forbes II*, F.3d at 504-05.

Candidate speech in a state-convened and -broadcast debate is thus unique. It affects not only the speaker, but also the voters, the viewers, and the electoral process. The continuation of a free society rests upon its careful protection. Any subjective governmental action which interferes with this process should be highly scrutinized and disfavored. "[N]o official, high or petty, can prescribe what shall be orthodox in politics . . . ." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

In addition, AETN's censorship was a prior restraint on Forbes' political speech. "Any prior restraint on expression comes to this Court with a heavy presumption against its

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424 U.S. at 19; *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, ___ U.S. ___, 116 S.Ct. 2374, 2414 (1996) (Kennedy, J., concurring in part, dissenting in part).

constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Southeastern*, 420 U.S. at 558. AETN "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Keefe*, 402 U.S. at 419. This is a burden AETN cannot carry. The nature of Forbes' speech and the importance of the broadcast's effect on the public's choice in voting are vital to maintaining a democratic society and require strict scrutiny, even without forum analysis.

B. AETN's Infringement Of Forbes' Fundamental Liberty Under The Fourteenth Amendment Requires Heightened Scrutiny.

AETN's actions in excluding a political candidate from a government-sponsored debate trigger not only the right of political campaign speech and voters' rights at the core of the First Amendment, but Fourteenth Amendment rights as well. As this Court has stated, core political expression is a "fundamental" right protected by the Due Process Clause of the Fourteenth Amendment. *Bellotti*, 435 U.S. at 780. Few rights could be more fundamental to "liberty" than the right of a candidate, who has duly qualified for the state ballot by the rules set forth by the people of his or her state, to be treated fairly and equally by the government. Government's use of its power to endorse or favor one candidate and disfavor another strikes at the very heart of a free society, which cannot tolerate direct governmental influence of election results. Infringement of a fundamental right by the government can be justified only by a compelling governmental interest necessitating such an infringement and effectuated in the least restrictive means. *See Wisconsin v. Yoder*, 406 U.S. at 214; *Roe v. Wade*, 410 U.S. 113, 152 (1973). AETN's banning of only Forbes from the political debate thus triggers strict scrutiny.

C. AETN's Use Of Subjectivity To Infringe Core First And Fourteenth Amendment Rights Fails Strict Scrutiny.

Since AETN's actions are a prior restraint on speech and implicate the most urgent protections of the First Amendment for core political speech and campaigns, as well as the fundamental liberty protections of the Fourteenth Amendment, its standardless and subjective discretion is insufficient to withstand scrutiny.[18] The government may not be allowed subjectively to act to influence the outcome of an election. Such government actions should be required to meet "narrow, objective and definite standards," and AETN may not vest "unbridled discretion in a government official." *Forsyth County*, 565 U.S. at 131, 133; *Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951); *Kunz v. New York*, 340 U.S. 290, 295 (1951). A subjective standard is defined as discretion "involv[ing] appraisal of facts, the exercise of judgment, and the foundation of an opinion." *Forsyth County*, 565 U.S. at 131 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940)). AETN's system is clearly subjective and does not meet First Amendment requirements.

As the Eighth Circuit noted, AETN conceded its criteria were "essentially subjective." *Forbes II*, 93 F.3d at 504. In addition to AETN's admission, the facts below reveal the government subjectivity exercised. AETN refers to Forbes as a perennial candidate with "no support," yet he received 46 percent of the vote in two statewide elections, including carrying a majority of 15 of the 16 counties of the instant Congressional District in a three-person race two years before his exclusion. (J.A. 149-51, 169-71) AETN supposedly carefully researched Forbes' media interest, yet it never called and checked with Forbes or the two dominant television news stations for the

[18] Forbes' argument here is separate and in addition to forum analysis. Forbes asserts here AETN's influencing a political campaign violates the First and Fourteenth Amendment without narrow and objective standards. This violation thus serves as a separate basis supporting the Eighth Circuit's judgment.

Third Congressional District. (J.A. 148, 158, 161-62, 177-78) AETN had no written policies to apply as to whom to exclude from the debate, and in fact went directly against its own policy of enhancing the diversity and full range of viewpoints for citizens and voters to consider. (App. 100a) It allegedly applied standards of monetary and popular support to Forbes but not to Republican candidate Dennis Scott, "an unknown." (J.A. 133-37, 175) AETN applied popularity and newsworthiness standards, which in and of themselves are inherently subjective and require perception and opinion. In determining the needs and interests of viewers, as AETN's own witness stated, "there are no rules in journalism." (J.A. 148) The editorial discretion AETN seeks is clearly unfettered discretion. Such unfettered discretion is not permitted in a government official acting in prior restraint of speech, especially where it affects speakers, voters, viewers, and the electoral process.

A similar case of unfettered discretion was presented in *Forsyth County*. In *Forsyth County*, a government administrator was permitted to vary a permit fee based upon his or her perception of the expected listener response which would consequently increase the cost of maintaining order. 505 U.S. at 124. This Court held such unbridled, subjective discretion in a government official is prohibited by the First Amendment. Likewise, AETN seeks unfettered editorial discretion in one unelected official to restrict the speech of minority candidates. It also bases its decision on its perception of the viewers' response and popularity of the speaker. Actually, the instant case is much worse. The speaker is a qualified political candidate, and his two opponents have been granted permission to speak. Additionally, the burden placed on Forbes was not just the increase of a fee but a complete denial and exclusion.

In *Buckley*, this Court upheld a differing treatment of political parties based on an objective standard laid out in advance and based upon the votes of the people. 424 U.S. at 87-89. Through years of painstaking legislative and judicial

effort, the people of Arkansas laid out their own objective threshold to test the seriousness of their candidates. ARK. CODE ANN. § 7-7-103(c)(1), (3). Ignoring the manifest will of the people, AETN seeks to supplant the citizens' standard with a subjective standard of its own. It seeks the power to evaluate particular candidates for office and exclude them on the basis of its perception of their worthiness for the debate. The First and Fourteenth Amendments prohibit such unbridled discretion over such fundamental political expressions. The government may not use its power and authority to throw its weight behind one or more candidates as against another, absent strict, narrow, definite, and objective standards assuring constitutional compliance. Such a narrow and objective standard existed in Arkansas; AETN chose to disregard it. Thus, its decision is not narrowly drawn and violates strict scrutiny.

IV. AETN IS RESTRICTED BY, AND NOT PROTECTED BY, THE FIRST AMENDMENT.

AETN is "an agency of the State of Arkansas," and is owned and operated by the State. (Pet. Brief at 2) Despite its admitted governmental character, AETN argues it is not bound by and should receive affirmative protection under the First Amendment. (Pet. Brief at 39-46) While this argument is a central theme of AETN's defense, the argument is without merit or support. AETN is a state agency and "part of the Government for purposes of the First Amendment" and thus restrained by it. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995).

AETN is requesting this Court to hold that it, the government, is protected under the First Amendment from suits by private citizens including Forbes. AETN has it completely

backwards.[19] The Constitution protects private citizens from the government. It does not protect the government from private citizens. "The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government." *CBS v. DNC*, 412 U.S. at 139 (Stewart, J., concurring) (emphasis in original); *see also Lee*, 505 U.S. at 695 (Kennedy, J. concurring) (stating "[t]he First Amendment is a limitation on government, not a grant of power"); *Turner I*, 114 S.Ct. at 2480 (O'Connor, J., dissenting) (stating "the First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat to free expression, and as a consequence, the Amendment imposes substantial limitations on the Government even when it is trying to serve concededly praiseworthy goals"). The First Amendment is a restraint on government action, not a protection against private citizens. *See CBS v. DNC*, 412 U.S. at 114. As the Eighth Circuit properly noted, "[t]he First Amendment exists to protect individuals, not government." *Forbes II*, 93 F.3d at 505.

AETN's extensive argument attempting to establish it is independent from higher government officials is irrelevant. AETN is the government. AETN cites no cases to support the novel proposition that lower-level government employees do not violate the First Amendment unless they are receiving pressure to do so from higher level government officials. "[N]o official, high or petty" may violate the First Amendment. *Barnette*, 319 U.S. at 642.

AETN's arguments under past media cases are also unavailing. Each of these decisions involved *private* broadcasters, who are, of course, protected by the First Amendment. As stated above, AETN is restrained by the First

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[19] Even the Solicitor General, on behalf of the FCC, while filing an *amicus* brief on AETN's side, notes that this argument is without merit. *See* "Motion of FCC to Participate in Oral Argument" at 4, n. 2.

Amendment. Cases involving the First Amendment rights of private broadcasters versus governmental and FCC attempts to provide a diversity of viewpoints in a scarce spectrum create a complex dilemma. Both sides are seeking the same end of providing for a diversity of viewpoints. Such a conflict, and thus complexity, does not exist in the instant case. Government AETN seeks not to increase but to decrease the diversity of viewpoints in the debate. As a result, AETN seeks to avoid application of the First Amendment altogether. Promoting expression of a diversity of viewpoints supports only Forbes. AETN's citation of these media cases involving private broadcasters thus does not support any position of *reducing* First Amendment protections or applications.

Arguments that the First Amendment should not apply to public broadcasters because they are subject to FCC oversight are also without merit. There is no precedent in American jurisprudence for the proposition that government may avoid constitutional mandates because another government agency oversees its actions. Alleged accountability to a government agency does not excuse lower-level government entities or officials from compliance with the U.S. Constitution.

AETN also argues it is not a state actor under *West v. Atkins*, 487 U.S. 42 (1988), and *Polk County v. Dodson*, 454 U.S. 312 (1981). While AETN asks that a state actor be considered a private actor, *West* analyzed the inverse question of whether a private doctor was a state actor. Finding he was performing a public function in treating prison inmates, this Court held he was engaging in action attributable to the State. West, 487 U.S. at 54.

Even if *West* were relevant for turning the government into a private actor, it is not helpful to AETN in the instant case. AETN's act and decision to exclude are not attributable to any private party or entity. Additionally, the exclusion in question was not the performance of any exclusively private

function. *West* is therefore not helpful to AETN. Under AETN's approach, any government official performing a function also performed by private industry could conveniently claim he or she was not a state actor and thus not bound by the Constitution. This is not the law.

Polk County is also not supportive of AETN's position. In *Polk County*, a county public defender was held not to be a state actor because he was performing a role inherently or necessarily adverse to the government. *See Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991) (explaining *Polk County*); *Polk County*, 454 U.S. at 323, n. 13. As this Court stated, *Polk County* is "the only case in which this Court has determined that a person who is employed by the State and who is sued under §1983 for abusing his position in the performance of his assigned tasks was not acting under color of state law." *West*, 487 U.S. at 50.

AETN is not adversarial to the government. The briefs of government *amici*, all filed in favor of AETN, as well as AETN's own arguments that it has a compelling interest in complying with the FCC, make clear AETN's cooperative and not adversarial role. AETN's argument that media have a role inherently adversarial to the government is without merit. The First Amendment and numerous other statutes set forth the clear governmental goal and requirement to protect and promote freedom of speech and the press, not attack it.

Unlike a public defender, whose very job is to fight the government prosecutor in court, AETN has no such inherent conflict or adversarial role. If AETN's broad adversarial theory were correct, all statutes and constitutional provisions would make particular government actors adversaries of the government in such areas, since the government actors might someday violate such provisions.

AETN is an agency of the State of Arkansas. It is

government-owned and -operated. Its request to avoid compliance with the First Amendment is simply an attempt to use the power of government without the corresponding accountability. It takes the tax money of the people, uses the power of eminent domain, and uses the attorney general as its attorney, and its shows may continue even if they are unpopular. It is not a private actor. It is the government and thus a state actor required to comply with the U.S. Constitution.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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